

Declaration of Mao  
ISO Plaintiff's Request  
for an Order to Show  
Cause

Redacted Version of  
Document Sought to  
be Sealed

Mark C. Mao, CA Bar No. 236165  
 Beko Reblitz-Richardson, CA Bar No. 238027  
 Erika Nyborg-Burch, CA Bar No. 342125  
**BOIES SCHILLER FLEXNER LLP**  
 44 Montgomery St., 41st Floor  
 San Francisco, CA 94104  
 Tel.: (415) 293-6800  
 mmao@bsflp.com  
 brichardson@bsflp.com  
 enyborg-burch@bsflp.com

James Lee (admitted *pro hac vice*)  
 Rossana Baeza (admitted *pro hac vice*)  
**BOIES SCHILLER FLEXNER LLP**  
 100 SE 2nd St., 28th Floor  
 Miami, FL 33131  
 Tel.: (305) 539-8400  
 jlee@bsflp.com  
 rbaeza@bsflp.com

Amanda K. Bonn, CA Bar No. 270891  
**SUSMAN GODFREY L.L.P.**  
 1900 Avenue of the Stars, Suite 1400  
 Los Angeles, CA 90067  
 Tel: (310) 789-3100  
 Fax: (310) 789-3150  
 abonn@susmangodfrey.com

*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA**

CHASOM BROWN, WILLIAM BYATT,  
 JEREMY DAVIS, CHRISTOPHER  
 CASTILLO, and MONIQUE TRUJILLO  
 individually and on behalf of all similarly  
 situated,

Plaintiffs,

vs.

GOOGLE LLC,

Defendant.

William Christopher Carmody  
 (admitted *pro hac vice*)  
 Shawn J. Rabin (admitted *pro hac vice*)  
 Steven M. Shepard (admitted *pro hac vice*)  
 Alexander Frawley (admitted *pro hac vice*)  
**SUSMAN GODFREY L.L.P.**  
 1301 Avenue of the Americas,  
 32<sup>nd</sup> Floor  
 New York, NY 10019  
 Tel.: (212) 336-8330  
 bcarmody@susmangodfrey.com  
 srabin@susmangodfrey.com  
 sshepard@susmangodfrey.com  
 afrawley@susmangodfrey.com

John A. Yanchunis (admitted *pro hac vice*)  
 Ryan J. McGee (admitted *pro hac vice*)  
**MORGAN & MORGAN**  
 201 N. Franklin Street, 7th Floor  
 Tampa, FL 33602  
 Tel.: (813) 223-5505  
 jyanchunis@forthepeople.com  
 mram@forthepeople.com  
 rmcgee@forthepeople.com

Michael F. Ram, CA Bar No. 104805  
**MORGAN & MORGAN**  
 711 Van Ness Ave, Suite 500  
 San Francisco, CA 94102  
 Tel: (415) 358-6913  
 mram@forthepeople.com

Case No.: 4:20-cv-03664-YGR-SVK

**DECLARATION OF MARK C. MAO IN  
 SUPPORT OF PLAINTIFFS' REQUEST  
 FOR AN ORDER TO SHOW CAUSE**

Referral: The Honorable Susan van Keulen

**DECLARATION OF MARK C. MAO**

I, Mark C. Mao, declare as follows.

1. I am a partner with the law firm of Boies Schiller Flexner LLP, counsel for Plaintiffs in this matter. I am an attorney at law duly licensed to practice before all courts of the State of California. I have personal knowledge of the matters set forth herein and am competent to testify.

2. I submit this Declaration in support of Plaintiffs' Request for the Court to issue an Order to Show Cause for Why Google Should Not Be Sanctioned for Discovery Misconduct.

3. On January 31, 2022, Google produced for the first time a document titled "[REDACTED]" that was "last updated: 05/05/2021." Ex. 21, GOOG-CABR-05757329.

4. This document, for the first time, indicated to Plaintiffs that Google submitted to its "[REDACTED]" or "[REDACTED]" team a plan to change Google's logging practices to log a "[REDACTED]" field in approximately [REDACTED] logs called [REDACTED] logs. Google did so to support a Dashboard tool [REDACTED]. Plaintiffs promptly followed up with Google and demanded further information on the Dashboard referenced in that document. Ex. 21, GOOG-CABR-05757329 at -31-32.

5. On February 18, 2022, Google produced approximately 283 documents from Bert Leung's custodial files. This production followed a ruling from the Court directing Google to tell Plaintiffs the "hit counts" for Mr. Leung's documents. Contrary to Google's assertions of burden with respect to producing Mr. Leung's documents, Google informed Plaintiffs that their search term proposal resulted in just 982 hits and agreed to produce responsive documents.

6. The documents Google produced from Mr. Leung's files on February 18, 2022, appeared to confirm for the first time several key pieces of information that Google never previously disclosed to Plaintiffs, the Special Master, or the Court.

7. *First*, the "[REDACTED]" or "[REDACTED]" team had actually approved the plan to log the "[REDACTED]" bit in approximately [REDACTED] logs. Ex. 3, GOOG-BRWN-

1 00845423.

2 8. *Second*, following that approval, Google implemented the change and began  
3 logging the “[REDACTED]” field, likely around May or June 2021 after the [REDACTED] team  
4 approved the change. Ex. 3, GOOG-BRWN-00845423; Ex. 9, GOOG-BRWN-00845312 at -18.

5 9. *Third*, Google engineers Bert Leung and Mandy Liu spent the next several months  
6 continuing to refine and improve their Dashboard tool to detect and monitor third-party cookie  
7 blocking based on those logging changes. Ex. 22, GOOG-BRWN-00845281; Ex. 23, GOOG-  
8 BRWN-00845275; Ex. 24, GOOG-BRWN-00845274.

9 10. Google had previously never disclosed to Plaintiffs, the Special Master, or the  
10 Court (a) that it had actually implemented a change to its logging practices in 2021 to log a  
11 “[REDACTED]o” field in (apparently) [REDACTED] logs or (b) the specific logs in which  
12 that field resides. To the contrary, as explained below and in Plaintiffs’ accompanying  
13 memorandum, Google went to great lengths to conceal this information throughout the discovery  
14 process (and particularly in the last several months during the Court-ordered Special Master  
15 process).

16 11. In September 2021, Google for the first time produced three *earlier* versions of the  
17 document titled “[REDACTED]” that discussed the possibility of logging  
18 a “[REDACTED]” field. None of those documents (a) indicated that the  
19 “[REDACTED]” field was actually implemented or (b) listed the specific [REDACTED] logs  
20 in which the field would ultimately be included.

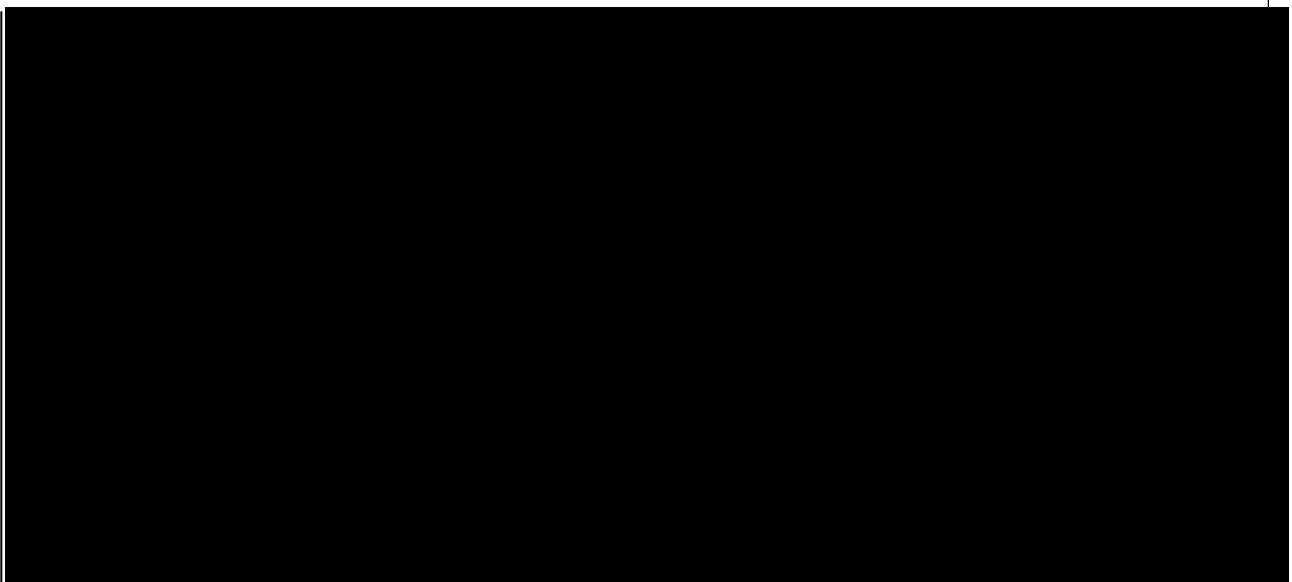
21 12. To the contrary, the most up-to-date version of the document that Google had  
22 produced (prior to January 31, 2022) discussed an *earlier* plan—which Google subsequently  
23 modified—to log the “[REDACTED]” in a set of [REDACTED] logs called [REDACTED] logs. These were  
24 *completely different logs* from the [REDACTED] logs in which Google appears to have ultimately  
25 implemented the “[REDACTED]” field. For example, Google produced one such  
26 document from Chris Liao’s files titled “[REDACTED],” which (a) was  
27 “last updated: 05/04/2021” and (b) discussed the abandoned QEM logging plan (as opposed to the  
28

1 [REDACTED] logging plan that was apparently added to the document on 05/05/2021). A true and correct  
2 copy of the most up-to-date version of the document Google produced in 2021 is attached as  
3 Exhibit 25 (GOOG-CABR-03668216).

4 13. On November 12, 2021, the Court issued an order requiring that “Google shall  
5 provide a declaration, under penalty of perjury from Google, not counsel, that 1. To the best of its  
6 knowledge, *Google has provided a complete list of data sources that contain information*  
7 *relevant to Plaintiffs’ claims . . .*” Dkt. 331 at 8 (emphasis added).

8 14. On November 18, 2021, Google submitted a declaration from Andre Golueke, “a  
9 Discovery Manager within the Legal Department at Google LLC.” Dkt. 338. The declaration  
10 certified that “Google has provided a complete list of sources that contain information about  
11 Plaintiffs relevant to Plaintiffs’ claims. The data sources are listed in Exhibit A.”

12 15. Exhibit A to Google’s declaration, in turn, *only listed [REDACTED] of the approximately [REDACTED]*  
13 *[REDACTED] logs* that may contain the “[REDACTED]” field according to the most up-to-  
14 date version of the “[REDACTED]” document that Google had produced  
15 in on January 31, 2022. *Compare* Ex. Dkt. 338-1 (Google’s Ex. A) *with* Ex. 3, GOOG-BRWN-  
16 00845423. And Exhibit A also only listed *[REDACTED] of the approximately [REDACTED] QEM logs* in which Google  
17 had *contemplated* logging the “[REDACTED]” bit according to the earlier design  
18 documents Google produced in September 2021. The chart below, created by Plaintiffs’ counsel,  
19 illustrates the extent of the declaration’s omissions:



1           16.     The Court also ordered that “within four days of the date of this Order Google is to  
2 provide to the Special Master full schemas, a list of ALL fields with their descriptions, a list of  
3 tools used to search the respective data sources, and instruction sets and manuals for all tools  
4 identified as being used by ‘Googlers’ to search each of the following data sources...” The Court  
5 then listed (a) [REDACTED] specific logs, (b) “any data sources searched in addition to the [REDACTED] listed above,”  
6 and (c) “[a]ny other of the data sources Plaintiffs specific from the list of potentially relevant data  
7 sources provided by Google . . . .” Dkt. 331 Ex. 1.

8           17.     On December 2, 2021, Google provided schema for [REDACTED] logs, including the only [REDACTED]  
9 [REDACTED] logs identified in Google’s sworn declaration (*i.e.*, the only [REDACTED] logs Google disclosed that  
10 actually, and unbeknownst to Plaintiffs, contained the “[REDACTED]” field).

11           18.     However, rather than produce “full schemas and a “list of ALL fields with their  
12 descriptions,” as the Court ordered, Google only produced field names for the “100 largest fields”  
13 in the [REDACTED] logs. None of those field names reflected the truth: that a  
14 “[REDACTED]” field was included in those [REDACTED] logs.

15           19.     Tellingly, for certain other logs that apparently do not include a  
16 “[REDACTED]” field, Google was happy to produce more than the 100 largest fields.  
17 For instance, on September 24, 2021, Google identified [REDACTED] fields in its [REDACTED] log.

18           20.     As a result of Google’s conduct, neither Plaintiffs nor the Special Master had *any*  
19 *idea that these [REDACTED] [REDACTED] logs contained the [REDACTED] field.* Nor did  
20 Plaintiffs or the Special Master have any idea that there may have been approximately [REDACTED] *other,*  
21 *undisclosed [REDACTED] logs* which also contained such a field.

22           21.     The very next day on December 3, 2021, Plaintiffs deposed Google employee Chris  
23 Liao, who is Bert Leung’s supervisor. Mr. Liao testified: “*There is no explicit signal to identify*  
24 *incognito mode traffic.*” Ex. 8, Liao Tr. 132:2-3. Mr. Liao further testified that “*it was determined*  
25 *that there was no reliable way to technically detect incognito in a definitive and reliable and*  
26 *accurate manner. And as a result no further action was taken to build such a hypothetical*  
27 *signal.*” I followed up by asking: “And that was within the confines of the existing architecture?”  
28

1 Because you said that you didn't then build any new dedicated signals, right, for incognito mode."

2 Mr. Liao answered: "*I'm not certain if we can build that or not.*" *Id.* 134:15-135:3.

3 22. Based on the information Google had disclosed by December 2021, Plaintiffs had  
4 no idea—and simply no reason to believe—that Google had (a) actually implemented its plan to  
5 log a "[REDACTED]" field or (b) that such a field was apparently included in [REDACTED]  
6 [REDACTED] logs (only [REDACTED] of which were even identified in Google's Court-ordered and sworn list of  
7 data sources). To the contrary, the documents, sworn declaration, and testimony proffered by  
8 Google suggested that the idea to log a "[REDACTED]" field in [REDACTED] logs (or  
9 elsewhere) had simply never been implemented. As a result, Plaintiffs did not select for their  
10 Iterative Search 1 either of the [REDACTED] [REDACTED] logs that Google disclosed in its sworn list of data  
11 sources.

12 23. Google finally produced Mr. Leung's custodial documents on Friday, February 18,  
13 2022, which set off a cascade of revelations that are the basis for this request for an order to show  
14 cause. For the first time, Google produced evidence confirming that the  
15 "[REDACTED]" field was actually logged in approximately [REDACTED] [REDACTED] logs.

16 24. On Sunday, February 20, 2022, Plaintiffs promptly alerted the Special Master and  
17 Google that those documents appear to reveal that "Google has omitted from its prior lists a critical  
18 data source—a '[REDACTED] log'" and the fact that Google had actually begun "adding a specific  
19 Incognito detection field to both its Search and Display logs."

20 25. The next day on Monday, February 21, 2022, Google unilaterally cancelled Mr.  
21 Leung's scheduled February 25, 2022 deposition, which had been set by written agreement.  
22 Google claimed that "a conflict has arisen for Mr. Leung on February 25." Google insisted that the  
23 deposition be rescheduled to March 4, 2022—the last day of fact discovery. Plaintiffs objected and  
24 repeatedly asked, via a Zoom call and multiple times in writing, what this supposed conflict was.  
25 Google refused to answer.

26 26. Plaintiffs thereafter met and conferred with Google on Wednesday, February 23,  
27 2022, under the Special Master's supervision. During the meet and confer, Google indicated that  
28

1 only one of the logs that Google identified in its November 2022 declaration contained the  
2 [REDACTED]” field. Google refused to answer Plaintiffs’ questions about what other  
3 logs contain that field, telling Plaintiffs to ask Mr. Leung during his deposition. Plaintiffs still do  
4 not have a list of the logs which logs contain this field (though based on documents Google  
5 produced on January 31, 2022, and February 18, 2022, it appears that there may be [REDACTED] such [REDACTED]  
6 logs). Google will not even confirm whether it withheld any logs with the [REDACTED] field  
7 that are specific to so-called “unauthenticated” data

8 27. Google also took the position during the meet and confer that it did not need to  
9 produce any logs that are “Search” logs notwithstanding whether the logs contain the  
10 [REDACTED]” field. But the Special Master in December already deemed Search  
11 logs to be within the scope of the process, particularly for class identification process.

12 28. Last November, following a document production, Plaintiffs were alarmed to  
13 realize that one of logs that Mr. Leung was studying, the [REDACTED], had not yet been  
14 disclosed. Plaintiffs promptly brought this missing log to the Special Master, and after reviewing  
15 the documents, he directed Google to produce the log schema for the log and to run searches of  
16 the log. Special Master Brush thus overruled Google’s objection that the log was irrelevant insofar  
17 as it was a “Search” log. From that point forward, Google was indisputably on notice that it could  
18 not withhold logs on the basis of the log being a “Search” log, particularly any log that Mr. Leung  
19 studied for his analysis, let alone a log in which Mr. Leung actually implemented the [REDACTED]  
20 [REDACTED] field.

21 29. Google has since then refused to tell Plaintiffs which other logs Mr. Leung  
22 evaluated in the early stages of his “log analysis of Chrome Incognito.” After Special Master Brush  
23 overruled Google’s objection on the [REDACTED], Plaintiffs asked Google whether any  
24 other logs that Mr. Leung studied had been withheld. Counsel for Google never responded to  
25 Plaintiffs’ multiple requests. *Id.*

26 30. Plaintiffs then propounded an interrogatory asking Google to “identify *every* log  
27 and data source that Google reviewed, analyzed, or searched as part of Google’s efforts to conduct  
28



1 a ‘log analysis of Chrome Incognito’ in and around mid-2020. *See, e.g.*, GOOG-CABR-  
2 05280756.” Google did not answer that question, either. Google instead evaded it by merely  
3 quoting back *one* of the logs that was already mentioned in the email that Plaintiffs cited. (“Google  
4 used [REDACTED] in the analysis of Ad Manager browsing traffic described in GOOG-  
5 CABR-05280756.”). Google’s evasion was improper. Google has subsequently clarified in meet-  
6 and-confers that Mr. Leung’s analysis was not limited to the logs mentioned in this one document,  
7 and yet Plaintiffs still do not have a complete list of every data source that Mr. Leung studied,  
8 much less a complete list of the logs in which “[REDACTED]” field has officially been  
9 implemented.

10 31. Over the course of the past week, Plaintiffs have asked Google to remedy the  
11 prejudice it has caused in multiple, reasonable ways: (a) by producing Mandy Liu’s custodial  
12 documents that hit on limited search terms tied to her work with Mr. Leung concerning the  
13 “[REDACTED]” field and permitting a 2-hour deposition of her; (b) by extending the  
14 fact discovery cut-off so that Plaintiffs can complete their discovery of Plaintiffs’ data and the  
15 “[REDACTED]” field; and (c) by identifying every other log that contains the  
16 “[REDACTED]” bit and promptly producing all schema, all field names, and all field  
17 descriptions from such logs (and subsequently searching them and producing full results). Google  
18 has simply refused.

19 32. Attached hereto as **Exhibit 1** is a true and correct copy of a document Google produced  
20 in discovery labeled GOOG-BRWN-00845639. The document was produced on February 18,  
21 2022.

22 33. Attached hereto as **Exhibit 2** is a true and correct copy of a document Google  
23 produced in discovery labeled GOOG-BRWN-00845596. The document was produced on  
24 February 18, 2022.

25 34. Attached hereto as **Exhibit 3** is a true and correct copy of a document Google produced  
26 in discovery labeled GOOG-BRWN-00845423. The document was produced on February 18,  
27 2022.

1           35. Attached hereto as **Exhibit 4** is a true and correct copy of a document Google  
2 produced in discovery labeled GOOG-BRWN-00023909. The document was produced on  
3 February 1, 2021.

4           36. Attached hereto as **Exhibit 5** is a true and correct copy of Plaintiffs' Interrogatories Set  
5 2.

6           37. Attached hereto as **Exhibit 6** is a true and correct copy of Google's Responses and  
7 Objections Plaintiffs' Interrogatories Set 2.

8           38. Attached hereto as **Exhibit 7** is a true and correct copy of a February 21, 2022 email  
9 exchange between counsel for Plaintiffs and counsel for Google.

10           39. Attached hereto as **Exhibit 8** are excerpts from the December 2, 2021 deposition of  
11 Google employee Chris Liao.

12           40. Attached hereto as **Exhibit 9** is a true and correct copy of a document Google produced  
13 in discovery labeled GOOG-BRWN-00845312. The document was produced on February 18,  
14 2022.

15           41. Attached hereto as **Exhibit 10** is a true and correct copy of a document Google  
16 Produced in discovery labeled GOOG-BRWN-00845569. The document was produced on  
17 February 18, 2022.

18           42. Attached hereto as **Exhibit 11** is a true and correct copy of a document Google  
19 produced in discovery labeled GOOG-BRWN-00845277. The document was produced on  
20 February 18, 2022.

21           43. Attached hereto as **Exhibit 12** are excerpts from a document Google produced in  
22 discovery labeled GOOG-CABR-05144884. The document was produced on November 16, 2021.

23           44. Attached hereto as **Exhibit 13** is a true and correct copy of Google's Responses and  
24 Objections to Plaintiffs' First Set of Requests for Production (Nos. 1-19).

25           45. Attached hereto as **Exhibit 14** is a true and correct copy of a document Google  
26 produced in discovery labeled GOOG-CABR-04324934. The document was produced on October  
27 5, 2021.

28

1           46. Attached hereto as **Exhibit 15** is a true and correct copy of a document Google  
2 produced in discovery labeled GOOG-BRWN-00845477. The document was produced on  
3 February 18, 2022.

4           47. Attached hereto as **Exhibit 16** is a true and correct copy of a document Google  
5 produced in discovery labeled GOOG-BRWN-00845481. The document was produced on  
6 February 18, 2022.

7           48. Attached hereto as **Exhibit 17** is a true and correct copy of a document Google  
8 produced in discovery labeled GOOG-BRWN-00845437. The document was produced on  
9 February 18, 2022. Part of the document is not visible because of how Google produced it.  
10 Plaintiffs consulted the metadata for the full text.

11           49. Attached hereto as **Exhibit 18** is a true and correct copy of a document Google  
12 produced in discovery labeled GOOG-CABR-05280756. The document was produced on  
13 November 24, 2021.

14           50. Attached hereto as **Exhibit 19** are excerpts of Google's Responses and  
15 Objections to Plaintiffs' Ninth Set of Interrogatories.

16           51. Attached hereto as **Exhibit 20** is a true and correct copy of a February 23, 2022 email  
17 exchange between counsel for Plaintiffs and counsel for Google.

18           52. Attached hereto as **Exhibit 21** is a true and correct copy of a document Google  
19 produced in discovery labeled GOOG-CABR-05757329. The document was produced on January  
20 31, 2022.

21           53. Attached hereto as **Exhibit 22** is a true and correct copy of a document Google  
22 produced in discovery labeled GOOG-BRWN-00845281. The document was produced on  
23 February 18, 2022.

24           54. Attached hereto as **Exhibit 23** is a true and correct copy of a document Google  
25 produced in discovery labeled GOOG-BRWN-00845275. The document was produced on  
26 February 18, 2022.

27           55. Attached hereto as **Exhibit 24** is a true and correct copy of a document Google  
28

1 produced in discovery labeled GOOG-BRWN-00845274. The document was produced on  
2 February 18, 2022.

3 56. Attached hereto as **Exhibit 25** is a true and correct copy of a document Google  
4 produced in discovery labeled GOOG-CABR-03668216. The document was produced on  
5 September 24, 2021.

6  
7 I declare under penalty of perjury under the laws of the United States of America that the  
8 foregoing is true and correct. Executed this 25th day of February, 2022, at Fremont, California.

9 /s/ Mark Mao  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28